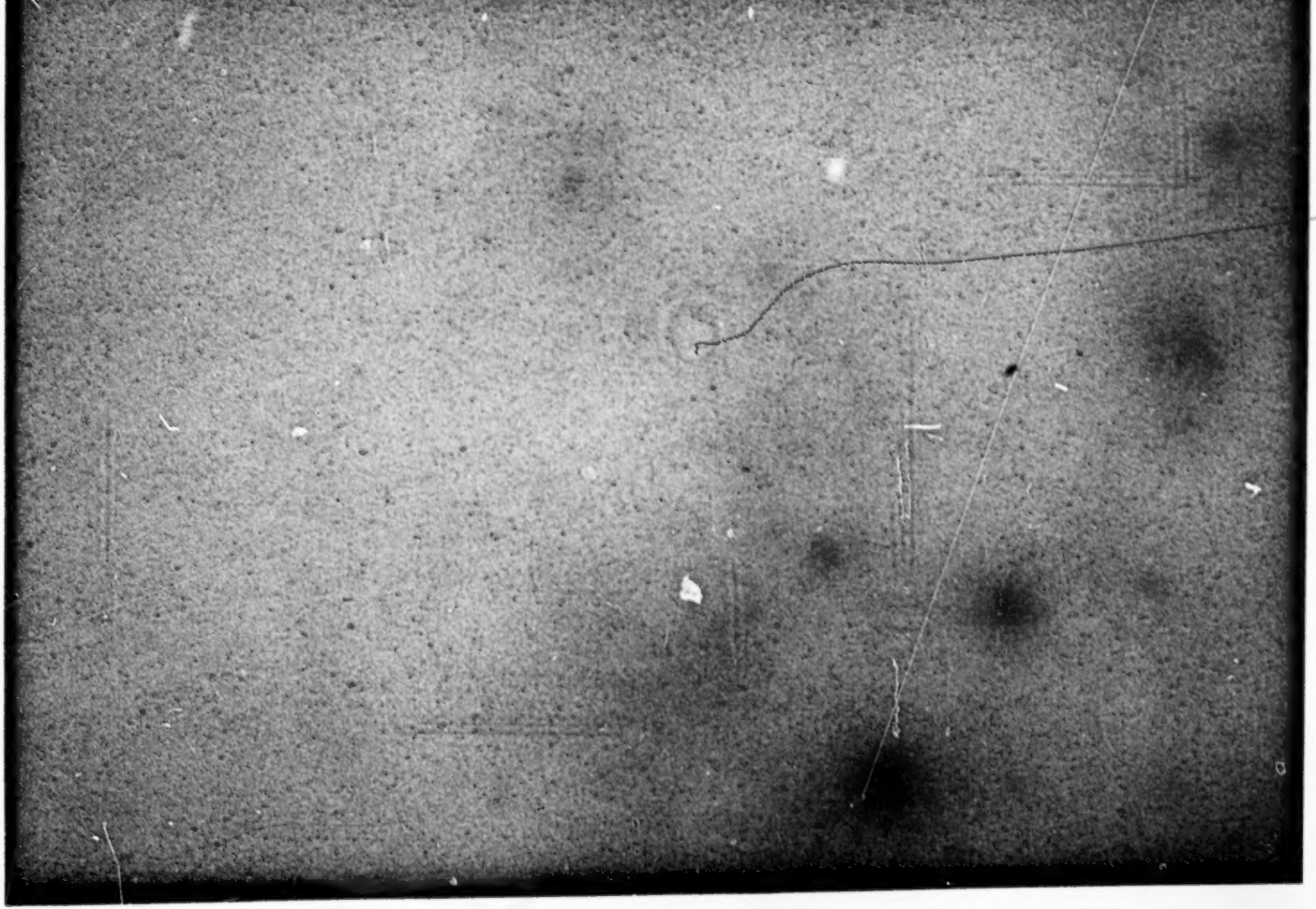


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No. 74-834

In the Supreme Court of the United States

OCTOBER TERM, 1974

JAMES G. DEMOPOULOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1. The Government memorandum in opposition to this Petition for Certiorari allows that "the two individuals in question testified that they had met him (Demopoulos) at the restaurant during that month and had passed to him money that was to be transmitted to a police captain as a bribe". (Gov. Mem., pg. 2). This statement is both inaccurate and misleading. In point of fact, only the witness Boznos, identified Demopoulos as being in the Rex Restaurant in February, 1969 (Tr. 141). The other occurrence witness Crispino, was unable to identify Dem-

opoulos; and identified a different person as being in the restaurant and accepting the money (Tr. 272). This salient fact is important in view of the instructions complained of because the Government states that the "ultimate issue for the jurors to decide was thus whether petitioner had been accurately identified as the individual who was present and received the money at that time" (Gov. Mem., pg. 4). Neither Demopoulos nor Boznos ever denied knowing each other prior to February, 1969 (Tr. 93; 122-124).[1]

The trial jury was presented with the classic "one on one". Boznos claiming Demopoulos was at the restaurant (but could not swear he saw Demopoulos receiving any monies) and Demopoulos denying he was there and claiming he was in Greece when the incident occurred. (Demopoulos proffered his passport as evidence (Tr. 370).

2. The Government suggests that *Hamling* v. *U.S.*, ... U.S. ....., 41 L.ed2d 590 (1974) forecloses a review of the Rule 30 violation (Gov. Mem. pg. 2, 3). This can hardly be the case, for in *Hamlin, ante,* the claimed error was a low toned bench conference after the jury was charged, albeit there had been an extensive and exhausting pre-charge conference (*Hamling,* 481 F.2d at 324). In this case there was neither a pre-charge conference nor a post-charge conference nor any opportunity to object to the jury instructions. We most respectfully submit, that the tendering of objections to a court reporter absent the trial judge does not conform to the explicit mandate of Rule 30 of the Federal Rules of Criminal Procedure. Any fair reading of Rule 30 compels the conclusion that not only

[1] Demopoulos denied knowing Crispino (Tr. 104) and also testified that he had been a patron at the Rex Restaurant many times (Tr. 98-99).

was the Rule 30 violation in this case total and in the extreme but it shatters imagination to conceive of the situation that in a federal criminal jury trial the trial court would not hear comment or objection to instructions either before or after the jury was charged. While it seems improbable that this could happen, indeed, that is exactly what happened. The Government's Memorandum does not suggest otherwise but suggests that *Hamling, ante,* may foreclose review on this question. *Hamling* does not so state. The judge in the *Hamling* case heard all of the objections himself, made his own rulings, gave counsel his due process right of persuasion, and decided the questions of law presented to him after hearing from both sides. Due process was not denied, and the substance of Rule 30 was followed in that in *Hamling*, full opportunity was granted to make objections out of the presence of the jury to the trial judge.

3. The Government's Memorandum suggests that a single instruction was raised on Petition for rehearing and that the challenged "instruction" was not the subject of objection below. Neither statement is accurate. *Seriatim*, the two (2) instructions were challenged on petition for rehearing (Pet. for Cert. App. 25, 26). Notwithstanding the difficulty of objecting in an empty courtroom, defense counsel at trial challenged both instructions (Tr. 484-486). Thus, the government's statement lacks accuracy.

4. The Government maintains in this Court "In any event, there was no error in the instructions" (Gov. Mem. pg. 3). Indeed there was. The instructions presented to this Court for review, directed verdicts of guilty and were clearly impermissible. The Government however makes no effort to make a distinction in this Court in addressing

arguments to the challenged instructions. With the hazard of repetition we quote:

> "For a judge may not direct a verdict of guilty no matter how conclusive the evidence. There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions, note 19 above, or on actual authorization or ratification of such acts; note 18. A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction. We are of the opinion, therefore, that the judge should have instructed the jury as to the limitations upon the association's liability for the acts of its agents under § 6. The error is aggravated by the failure to give the correct charge upon request." *United Brotherhood, et seq.* v. *U.S.*, 330 U.S. 408, 9; ft. nts. omitted.

In *United Brotherhood, ante,* the Court reviewed the instruction(s) under the "plain error" doctrine (330 U.S. 411, 412). In *Bollenbach* v. *U.S.*, 326 U.S. 607 (1946) this Court reversed a conspiracy conviction relating to the violation of the National Stolen Property Act (18 U.S.C.A. §413, *et seq.*). This Court reviewed a challenged charge to the jury and in reversing the conviction allowed:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue". (326 U.S. at 613).

In *Bollenbach, ante,* the Government argued that notwithstanding the single challenged instruction there was sufficient proof to convict (326 U.S. at 614). This Court there found the Government's suggestion untenable and in reversing stated:

> ". . . In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record,

> but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." 326 U.S. 614

In *Bihn* v. *U.S.*, 328 U.S. 633 (1946) this Court reversed a conspiracy conviction relating to the improper use of gas ration stamps because of impermissible jury instructions suggesting that it was for the jury to decide whether Ms. Bihn stole the stamps in question and if she did not, who did? (328 U.S. at 636, 7) This Court reversed that conspiracy conviction because of the impermissible instructions; finding that the instructions could not be deemed harmless error. The Court went on to say:

> "Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government." (328 U.S. 638, 9)

To be sure, the error in the instructions in this case and the denial of petitioner's right to have his counsel address the trial judge at a most critical stage of his trial are of Constitutional magnitude and as such this conviction must be reversed unless the errors be classified as harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967).

5. The government proffers the cases of *United States* v. *Musgrave*, 444 F.2d 755 (5th Cir., 1971), *United States* v. *Bosch*, 505 F.2d 78, 82 (5th Cir., 1974) as apparent authority for the proposition that instructions as in the case at bar do not merit reversible error (Gov. Mem. pg. 4). Each of these cases were reversed because of impermissible instruction to the jury under the "plain error doctrine" (Fed. R. of Crim. Proc. 52(b)). In fact, in *Bosch, ante*, the Court of Appeals for the Fifth Circuit while reversing

the conviction for conspiracy to possess and distribute marijuana allowed that "a court should never direct a verdict of guilty, in whole or in part" (505 F.2d at 82).

6. Saving further analysis of this troubled conviction we simply submit that the indictment charged perjury and based on a "one on one" conflict in testimony, a mis-instructed jury found Demopoulos guilty. Our petition made suggestion that this court had yet to consider a situation where total Rule 30 non-compliance was presented. (Pet. for Cert. pg. 19). The Government fails to suggest a single case where this court has been asked to review (or has denied review) where there was a total lack of Rule 30 compliance.

7. The Government has either ignored or failed to meaningfully discuss Petitioner's argument that this court may review the challenged instructions. *Sub nom*, it would appear that this Court might well overlook the fact that petitioner did not raise the challenged instructions in the Court of Appeals until the filing of his timely petition for rehearing. We have already made mention that both instructions were challenged by defense counsel in the empty courtroom while the jury was deliberating.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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